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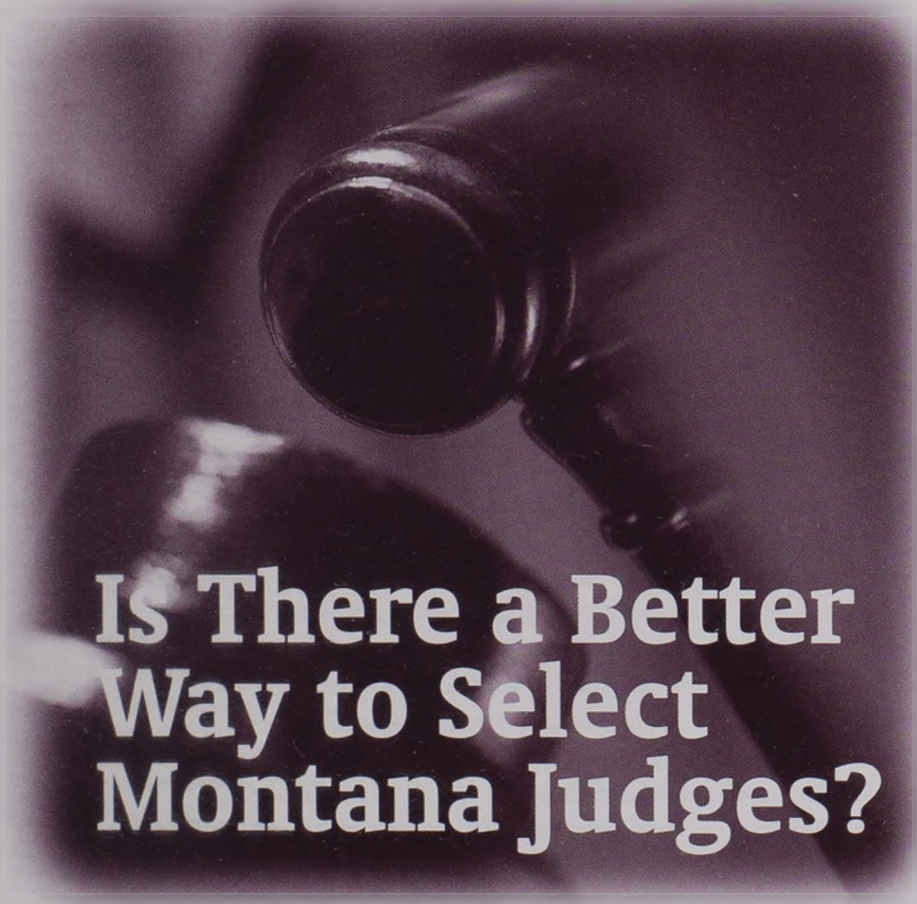
ISSUES SHAPING OUR STATE



Is There a Better Way to Select Montana Judges?

by Jean M. Bowman*

former U.S. Supreme Court Justice Sandra Day O'Connor warned Americans recently, "Judicial elections are becoming political prizefights where partisans and special interests seek to install judges who will answer to them instead of the law and the Constitution." In a similar vein, the American Bar Association has long urged states to select their judges on the basis of merit. This essay will argue that Montanans should take to heart these astute and important observations.

What lies behind the concerns of Justice O'Connor and the ABA? A new report compiled by Justice at Stake, a nonpartisan group, shows that business interests spend twice as much money on state high-court elections than do all other groups combined, including lawyers and unions. In Texas, the court system has been under close scrutiny since a television station raised the specter of campaign money influencing judicial decision making. In a poll of Texas business leaders, 70 percent expressed their uneasiness with this possibility and favored some selection system other than election. A national poll by the Annenberg Public Policy Center found that seven in ten voters believe that the need to raise campaign funds could affect a judge's rulings. A report by the Cato Institute concluded that judicial elections "become inordinately expensive, create a perception of impropriety, and may produce judges beholden to deep-pocketed donors with recurring business before the court." And in Georgia, the National Association of Manufacturers last year spent $1.3 million, unsuccessfully, in attempting to defeat a sitting justice.

There is another side to this question. Former U.S. Supreme Court Justice Thurgood Marshall defended the election of judges based on their individual life experiences and values because he contended their voting patterns are traceable to their life philosophies. The argument is pretty straightforward: If judges "make law" by judicial interpretation, then the people should have a direct role in choosing them. The Washington, D.C.–based Federalist Society similarly argues

that partisan judicial elections have "substantial advantages over the alternatives, not least [because] they provide an additional, significant measure of self-government to voters." The Annenberg study, cited previously, found that nearly two in three voters preferred to elect judges rather than have them appointed on the basis of merit. And Ohio voters turned down a merit system of selecting judges in part because they believed appointed judges would be too tied to the governor.

The importance of the selection debate cannot be overstated. The goal should be the best method possible, that is, one that secures the independence and legitimacy of the judiciary and prevents conflicts among the three branches of government. Also, the method of judicial selection used — whatever it might be — must have the support of a majority of the voters. Next we ask, what method of judicial selection is currently in place in Montana and why?

The Montana statehood Constitution of 1889 provided for partisan election of judges. Anyone meeting minimal qualifications specified in law was eligible to run. In the late 1960s, a group calling themselves Montana Citizens for Court Improvement began working to reform how the state selects its judges. Their recommendation, called The Montana Plan, incorporated much of what had come to be called the Missouri Plan or Merit Plan of judicial selection. A few years later, delegates to the 1972 Montana Constitutional Convention agreed to do away with partisan judicial elections, but they were sharply divided on what method to use to select judges. The convention's judiciary committee heard testimony from judges, lawyers, professors, and citizens for and against the merit system. On all proposals to change the 1889 judiciary article, the committee split 5 to 4. On the floor of the convention, delegates hammered out a middle ground between those advocating election and those advocating appointment. That compromise is what the state has lived with since.

The Judiciary Article of the 1972 Montana Constitution (Article VII), permits any person who meets the legal qualifications for a judge to run in a nonpartisan election. Qualifications include United States citizenship, residency in the state for two years, and membership in the state bar for at least five years before taking the bench. The 1972 Constitution provides that when a district or supreme court vacancy occurs, the Judicial Nominating Commission — made up of four laypersons appointed by the governor, a district court judge chosen by other district judges, and two attorneys appointed by the state supreme court — meets. Customarily, this commission interviews applicants for the vacant position and submits three to five names to the governor. If the governor fails to make a selection within 30 days, the decision passes to the chief justice. In either case, the nomination goes to the state senate, which either confirms or fails to confirm the nominee. If the nominee is not confirmed, the appointment process starts over again. Because the Montana Legislature meets in regular session only every other year, some appointed judges can serve upwards a year before the senate acts. A nominated and confirmed judge serves until the next general election, at which time the judge must decide whether to run for an elected term. Judges who are unopposed still have their names on the ballot and electors are given the choice of voting whether or not to retain them. A referendum on a sitting judge may be enlivened if a challenger files and makes the election a contested affair.

Since 1972, when the present judicial selection system took effect, most of Montana's judges and justices have been appointed by the governor. Most of these appointees have then retained office by virtue of being unopposed in the next general election. Elective competition, when it has occurred, has been more prevalent at the supreme court level than the district court level, and most often incumbent judges have won by large margins. Moreover, contestants in an open judicial race and challengers to a sitting judge rarely have been screened by the Judicial Nominating Commission.

In 1940, Missouri became the first state to adopt the merit plan of selecting judges. But since then, the reform has hardly taken the nation by storm. Currently, 23 states use the system. Though the judicial-selection debate has continued for more than 100 years, I strongly believe that Montana should take its stand among the reform states. To explain why, we

need to compare the merit plan to the state's present muddled system.

The merit plan has three basic elements: nomination by a nonpartisan committee on the basis of merit, appointment by the governor, and retention or dismissal by voters at periodic elections. Although some of the 23 states do not use all of these features, one feature uniformly followed is the criterion of merit. The essence of the judicial office — the wise, impartial, and reasoned decision of cases — argues for judges who are of good character, bright, well educated, broadly experienced, sharp in analysis, accomplished in writing, and beholden to no one.

But how does the voter know if a judicial candidate is fair, objective, patient, hard working, clear thinking, and highly literate? The short answer is that most voters cannot determine whether a judicial candidate possesses the necessary qualification to be a good judge. Because judicial elections cannot turn on how someone would decide a case, they focus instead on such irrelevancies as whether the candidate was a sports star, attends church regularly, participates in political party functions, or looks like a judge. And when judicial campaigns get down to more "judicial" issues, some voters ask whether an incumbent decided for labor more often than for management, whether the judge has a good environmental record, or whether the judge tends to side with the defendant. Judicial decisions, however, are far more complicated than portrayed by politicians or the press; they are colored in many shades of gray, not black and white. The facts might have favored labor, or the environmentalists argued the wrong law, or the prosecutor couldn't prove that the accused committed the crime.

Justice is supposed to be blind and, therefore, judges must be independent. They should not be politicians raising money from favor seekers or courting votes with promises improper or impossible to keep. They should keep their distance from the political stage, a venue more appropriate for legislative and executive officials. They should have no platform in the conventional sense. Surely judges are not supposed to represent us as other public officials do. Their job is to interpret the law and apply it to an established set of facts.

Scholars agree that a good constitution provides the basic framework of government and gives the legislature the authority to fill in the necessary details. As time goes forward and change becomes necessary, necessary reforms should be brought about through legislative action and not the cumbersome process of constitutional amendment. While it is clear that the 1972 judiciary article is much shorter and less detailed than the 1889 judiciary article (the former does cover, in addition to the selection of judges, kinds of courts, number of justices, length of terms, temporary assignment of judges, and discipline of judges), I believe an even shorter article would better serve Montanans. My position is taken with full understanding that the political likelihood of such a change is dim and that it is nearly impossible to prove a link between improvement in the administration of justice and new constitutional language. I also readily admit that it is difficult to find serious fault with our judicial branch as now administered. Further, it would be inappropriate to find fault with the men and women who currently serve on our courts. I do, however, question the method of judicial selection provided for in our state constitution. Presently, some judges are screened and some are not; some judges have to participate in contested elections, and some do not. For the long term it would be better to have a uniform and predictable selection process.

Suppose the Montana Constitution's judiciary article read as follows:

SECTION I. JUDICIAL POWER

The judicial power of the state shall be vested in a unified judicial system, including an appellate court and other courts provided by law.

SECTION II. APPELLATE COURT

The appellate court shall have final statewide appellate jurisdiction. It shall have original jurisdiction to issue, hear, and determine all writs appropriate to the exercise of its jurisdiction. It shall have the power to administer the courts to assure fairness and efficiency. It shall have the power to make all rules relating to the practice of law and to make procedural rules which are not inconsistent with state law.

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SECTION III. ALL OTHER COURTS

Other courts shall have original jurisdiction in cases arising under the laws of this state.

SECTION IV. JUDICIAL OFFICE

Justices and judges shall be appointed as provided by law to serve a term not less than six years.

This scaled-down version of a judiciary article would allow the legislature to "fill in the blanks" to meet the changing needs of our state judicial system. It would permit relatively easy change in the shape and number of judicial districts, jurisdiction of the courts, and rules of procedure. But most importantly, it would protect the independence of the state judiciary by providing a judicial *appointment* process, which could be designed to incorporate any, or all, elements of the merit plan. There would be no judicial prizefights in Montana!

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